IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.2158 OF 2005

Shri Kaushik Vrudhichand Shah & Ors. ...Petitioners
Vs.
The State of Maharashtra ...Respondent

Shri R. J. Parekh for the Petitioner.
Ms S. V. Gajare, A.P.P. for the Respondent.

CORAM : A.M. KHANWILKAR, J.
DATE : DECEMBER 02, 2005.

P.C.:

1. Heard the Counsel for the parties. Rule. Rule made returnable forthwith. Ms S.V.Gajare, A.P.P. waives service for the Respondent. As short question is raised, petition taken up for final disposal forthwith by consent.

2. The Petitioners are facing trial pending before the Court of Metropolitan Magistrate at Vikroli, Mumbai being Criminal Case No.24/P/2001 in relation to offence punishable under section 498-A of the Indian Penal Code. After the F.I.R. was registered, investigation was proceeded with and thereafter chargesheet has been filed. Thereafter, charge has been framed by the concerned Court on 24th March, 2004.

3. Suffice it to observe that the complainant moved an Application on 09th February, 2004 seeking

the permission of the Trial Court to engage/instruct private advocate under section 301(2) of the Code of Criminal Procedure. That Application has been allowed by the Trial Court on 09th February, 2004. This order was challenged by the Petitioners-accused before the Revisional Court. Besides, on 19th January, 2005 Assistant Police Inspector presumably the Investigating Officer made Application before the Trial Court for permission to carry on further investigation within the meaning of Section 173(8) of the Code. Even that Application is allowed on 19th January, 2005 by passing following order:

"i) Permission is granted as prayed for in the interest of justice".

4. Even this order was subject-matter of the challenge before the Revisional Court. The Revisional Court, while disposing the Criminal Revision Application No.340 of 2005 has observed, in paragraph 6 of the order, that the Trial Court has merely permitted the complainant to engage private advocate in terms of section 301(2) of the Code which was permissible and no fault can be found with that order. In so far as the order passed by the Trial Court on 19th January, 2005 allowing request of the

Investigating Officer to carry on further investigation that has been considered by the Revisional Court in paragraph 14 onwards. The Revisional Court has held that it was open to the Investigating Officer to move the Trial Court by such Application and no fault can be found with the order as passed. These two aspects are subject-matter of challenge before this Court.

5. In so far as the question regarding appropriateness of order dated 19th February, 2004 passed by the Trial Court allowing the Application of the complainant seeking permission to engage/instruct private advocate under section 301(2) of the Code is concerned, no fault can be found either with the order passed by the Trial Court or for that matter, the opinion recorded by the Revisional Court in rejecting the contention of the Petitioners in that behalf. To that extent, both the orders passed by the Trial Court and the Revisional Court will have to be upheld.

6. In so far as the second order passed by the Trial Court dated 09th January, 2005 of the Application preferred of the Investigating Officer is concerned, according to the Petitioners the said Application was filed by an incompetent person. It

could have been filed only by the officer-in-charge of Police Station who alone is authorised to submit the report to the Magistrate in terms of section 173(8) of the Code. Section 173(8) of the Code refers to the officer as "officer-in-charge of the Police Station" and not Investigating Officer.

7. Section 2(o) defines "Officer in charge of a Police Station" includes, when the officer in charge of the police station is absent from the station-house or unable from illness or other cause to perform his duties, the police officer present at the station-house who is next in rank to such officer and is above the rank of constable or, when the State Government so directs, any other police officer is so present. Indeed no inquiry has been made either by the Trial Court or Revisional Court on this aspect.

8. Besides, it is contended on behalf of the Petitioners relying on the decision of the Calcutta High Court in the case of Jitendra Nath Ghosh & Anr. Vs. The State reported in 1976 Cri.L.J. 1296 that it is not open to permit the Investigating Agency to fill in the lacunas by authorising further investigation under section 173(8) of the Code. This grievance according to the Petitioners was made before the

Revisional Court but has not been considered at all. In so far as the Trial Court is concerned, no reason what-so-ever has been recorded except of observing that the permission sought in the Application filed by the Investigating Officer was granted in the interest of justice.

9. Viewed in this perspective, the appropriate course to my mind is to set aside the order of the Trial Court dated 19th January, 2005 and consequently, order of the Revisional Court which is impugned in this Petition dated 29th June, 2005 to this limited extent and relegate the parties before the Trial Court who in turn shall record fresh opinion on the Application preferred by the Sub-inspector of Police, Pant Nagar Police Station dated 19th January, 2005 praying for permission for further investigation into the case. The Trial Court shall consider all contentions raised on behalf of the Petitioners or the other side, as the case may be, and take appropriate decision in the matter in accordance with law.

10. Petition succeeds to the above extent.

A.M.KHANWILKAR, J.